

In The Matter Of:
JULIO PEREZ, v
PROGENICS PHARMACEUTICALS, INC.,

October 1, 2014

SOUTHERN DISTRICT REPORTERS
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<p>Ea11perc Page 1</p> <p>1 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK 2 -----x</p> <p>3 JULIO PEREZ, 4 Plaintiff, 5 v. 10-CV-8278 6 PROGENICS PHARMACEUTICALS, INC., 7 Defendant. Final Pretrial Conference 8 -----x 9 10 New York, N.Y. October 1, 2014 10:15 a.m.</p> <p>11 Before: 12 HON. SAMUEL CONTI, 13 District Judge 14 15 APPEARANCES 16 JULIO PEREZ Pro Se Plaintiff 17 FENSTERSTOCK & PARTNERS LLP Attorneys for Defendant 18 BY: BLAIR C. FENSTERSTOCK, ESQ. THOMAS A. BROWN II, ESQ. 19 20 21 22 23 24 25</p>	<p>Ea11perc Page 3</p> <p>1 Both sides are entitled to a fair trial. I'll see that you get 2 a fair trial, but I'm not going to give you any goodies. Do 3 you understand that? 4 MR. PEREZ: Yes. 5 THE COURT: Okay. Now who are your witnesses? 6 MR. PEREZ: Well, before I -- 7 THE COURT: You're going to have to speak up because I 8 can't hear you. 9 MR. PEREZ: Before I answer your question, your Honor, 10 may I make a clarification? 11 THE COURT: All I want to know, who are your 12 witnesses? 13 MR. PEREZ: I don't have that information, your Honor, 14 because I only received -- 15 THE COURT: Wait a minute. I want to know right now, 16 who are your witnesses? 17 MR. PEREZ: I received your Honor's order only on 18 September 25th, one day after the pretrial submissions were 19 due. I have -- it was postmarked -- 20 THE COURT: I want to know right now, who are your 21 witnesses? Unless you tell me now, nobody's going to testify 22 on your behalf, other than you. Do you understand that? 23 MR. PEREZ: May I give you an approximate number? 24 THE COURT: A what? 25 MR. PEREZ: May I --</p>
<p>Ea11perc Page 2</p> <p>1 (Case called) 2 THE DEPUTY CLERK: Counsel, please come forward and 3 state your appearances at the podium. 4 MR. FENSTERSTOCK: Good morning, your Honor. Welcome 5 to New York. My name is Blair Fensterstock and with me is Tom 6 Brown. We represent the defendant Progenics Pharmaceuticals. 7 THE COURT: All right. 8 MR. PEREZ: Good morning, your Honor. I am Julio 9 Perez, pro se plaintiff. 10 THE COURT: Do you have an attorney? 11 MR. PEREZ: No. I am pro se. 12 THE COURT: Are you acquainted with the rules of 13 court? 14 MR. PEREZ: Yes. 15 THE COURT: Well, apparently you haven't followed them 16 so far. Do you have a list of your witnesses? I always like 17 to get a list of the witnesses that are going to testify. Do 18 you have a list of witnesses? 19 MR. PEREZ: No, your Honor. No, I don't. I would 20 like to clarify -- 21 THE COURT: Do you have any witnesses? I want you to 22 understand one thing. I appreciate the fact that you're pro 23 se, but because you're pro se doesn't mean you have any more 24 liberties than anybody else. I'm going to treat you like 25 you're a lawyer, because it wouldn't be fair to the other side.</p>	<p>Ea11perc Page 4</p> <p>1 THE COURT: I don't want a number. I want the names 2 of the people that are going to testify. Have you told the 3 attorneys who your witnesses are? 4 MR. PEREZ: No, your Honor. 5 THE COURT: Well, you should tell the attorney. You 6 had an attorney before. Didn't you have an attorney before you 7 discharged him? 8 MR. PEREZ: Yes. 9 THE COURT: Did you have an attorney before? 10 MR. PEREZ: Yes, I did, but that never came up. 11 THE COURT: I want to tell you one thing. You either 12 have to tell me and tell the other side who your witnesses are 13 right now or they can't testify at trial. I don't want an 14 approximate number. I want names. Do you understand? 15 MR. PEREZ: I understand your Honor, but I received 16 the order the day after that information was requested by the 17 court. 18 THE COURT: Well, do you know who your witnesses are? 19 I'm tired of telling you the same thing over and over again. I 20 want you to tell me right now, who are your witnesses? Do you 21 have any witnesses? 22 MR. PEREZ: May I request some time to -- 23 THE COURT: No, you request nothing. This is the date 24 we hear the pretrial motions. The other side has a right to 25 know who your witnesses are. When you file your claim you've</p>

<p>Ea11perc Page 5</p> <p>1 got to tell them who your witnesses are, potential witnesses 2 are. 3 MR. PEREZ: I am at a loss, your Honor. 4 THE COURT: What's that? 5 MR. PEREZ: I am at a loss to answer. I don't know 6 how to answer that question. 7 THE COURT: Do you intend to call anybody on your side 8 of the case? 9 MR. PEREZ: Yes. 10 THE COURT: Who? 11 MR. PEREZ: There are a number. Does the list need to 12 be final or can I give you a number? 13 THE COURT: No, the list has to be right now. You've 14 had plenty of time. The other attorneys have a right to find 15 out who your witnesses are going to be. They're going to want 16 to take their depositions. They may want to take their 17 deposition. 18 MR. PEREZ: It's -- 19 THE COURT: This is not a trial by ambush. Do you 20 know what I mean? 21 MR. PEREZ: Oh, absolutely. 22 THE COURT: This is not a trial by ambush. Everybody 23 has a right to know who your witnesses are, and I'm telling 24 you, unless you can tell me right now who your witnesses are, 25 nobody is going to take the stand in your behalf. Is that</p>	<p>Ea11perc Page 7</p> <p>1 very simple. That's the rule. I don't make the law, you know, 2 I try to interpret it as much as I can. 3 MR. PEREZ: But again, your Honor, I received your 4 Honor's order the day after -- 5 THE COURT: You don't have to receive my order. The 6 rules of the court are such that you have to give them a list 7 of your witnesses. I'm through telling you about it. They're 8 not going to testify. The only person who's going to testify 9 is you. You got that? 10 MR. PEREZ: Because I haven't given the opposing 11 counsel any information about this, because I only got the 12 order after the fact. 13 THE COURT: You don't have to get an order. It's in 14 the rules of the court. Well, anyway, there's no witnesses on 15 your behalf going to testify. You're the only one that's going 16 to testify. Do you understand that? That's it. 17 So do you have any other problems in the case you'd 18 like to talk to the court about? I'd be happy to answer your 19 questions. 20 MR. PEREZ: I'm sorry? I didn't hear the last part. 21 THE COURT: Do you have any questions about the case 22 or the conduct of the trial? 23 MR. PEREZ: Well, it's to emphasize that I only -- 24 THE COURT: I understand you're a PhD, aren't you? 25 MR. PEREZ: Yes.</p>
<p>Ea11perc Page 6</p> <p>1 clear? 2 MR. PEREZ: Okay. So I have seen opposing counsel's 3 list of witnesses, and in addition to those -- 4 THE COURT: Wait. What did you just say? 5 THE DEPUTY CLERK: Can you lift the microphone up to 6 your mouth? 7 MR. PEREZ: I'm sorry. Can you hear me better now? 8 THE COURT: I can hear you. I want a list of your 9 witnesses. 10 MR. PEREZ: In addition to the list, opposing 11 counsel's list, I would like to call Peter Lukacsko -- 12 THE COURT: Did you tell the other side who you intend 13 to call? 14 MR. PEREZ: No. 15 THE COURT: Well, then you can't call them. You 16 cannot call them. 17 MR. PEREZ: But I'm sorry to belabor the point, but 18 it's like I said -- 19 THE COURT: There's no belaboring of the point. They 20 have a right to know who your witnesses are. You haven't told 21 them who your witnesses are, they cannot testify. 22 So do you have any other problems in the case? 23 MR. PEREZ: The problem is I haven't given opposing 24 counsel the names of any witnesses -- 25 THE COURT: Well, they're not going to testify. It's</p>	<p>Ea11perc Page 8</p> <p>1 THE COURT: And do you have an understanding of what 2 we're doing here this morning? 3 MR. PEREZ: Absolutely. 4 THE COURT: All right. Absolutely. You had an 5 attorney before, correct? 6 MR. PEREZ: Yes. 7 THE COURT: And you fired him, correct? 8 MR. PEREZ: Yes. 9 THE COURT: Okay. So you're acting as your own 10 attorney now. Do you know how to conduct a trial? 11 MR. PEREZ: Yes, I have -- yes, I have a basic idea 12 and information about it, yes. 13 THE COURT: Do you understand we're going to pick 14 eight jurors? Do you understand that? 15 MR. PEREZ: Yes. 16 THE COURT: We'll pick eight jurors, and each side has 17 a right to challenge a juror after I've asked them some 18 questions whether they know anybody involved in this case or 19 anything about this case. And then you have challenges. You 20 have three challenges and the other side has three challenges. 21 Do you understand that? 22 MR. PEREZ: Yes. 23 THE COURT: Okay. 24 MR. PEREZ: Also, I would like to clarify or to stress 25 that in your Honor's list of pretrial submissions, there are</p>

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<p>Ea11perc Page 9</p> <p>1 eight items, and I only got this list on September 25th.</p> <p>2 THE COURT: I don't care when you got the list. You</p> <p>3 got the list, and now's the time to hear it. Now tell me, have</p> <p>4 you submitted your set of jury instructions? You haven't done</p> <p>5 that either.</p> <p>6 MR. PEREZ: No, because I got your Honor's order on</p> <p>7 September 25th and they were due -- all the pretrial</p> <p>8 submissions were due on September 24th, and I wrote a letter</p> <p>9 to your Honor explaining --</p> <p>10 THE COURT: I don't bother with letters. I bother</p> <p>11 with my orders. That's the only thing I bother about. And you</p> <p>12 either comply with them or you don't comply with them, one of</p> <p>13 the two.</p> <p>14 MR. PEREZ: Okay, but in my letter I requested an</p> <p>15 adjournment --</p> <p>16 THE COURT: You're not going to get an adjournment.</p> <p>17 The trial is set on the date I set it. That's it. There's no</p> <p>18 adjournment, period. We're going to try this case. We're not</p> <p>19 going to continue it till we're all dead.</p> <p>20 MR. PEREZ: But, your Honor, this case was on the</p> <p>21 White Plains court before --</p> <p>22 THE COURT: I told you, Mr. Perez, this case is tried</p> <p>23 in this court on the date that I set it.</p> <p>24 MR. PEREZ: Yes.</p> <p>25 THE COURT: That's the date. So we don't have to</p>	<p>Ea11perc Page 11</p> <p>1 Okay?</p> <p>2 MR. PEREZ: Yes. Your Honor, without pretrial</p> <p>3 submissions, without time for preparation --</p> <p>4 THE COURT: You want to submit something to me, submit</p> <p>5 it by next Tuesday. You want to do that? Put in writing. I</p> <p>6 don't like letters. Put it in motions and file it with the</p> <p>7 court and I'll read it. Do you want to do that? Whatever you</p> <p>8 want to file, file next Tuesday.</p> <p>9 MR. PEREZ: Okay. May I submit what I haven't had,</p> <p>10 the most important, the most critical items? Because there is</p> <p>11 a long list and --</p> <p>12 THE COURT: What are the items? Do you know what they</p> <p>13 are right now? Tell me. Give me the order right now. What</p> <p>14 are they?</p> <p>15 MR. PEREZ: Yes. Well, okay. Your Honor asks for</p> <p>16 joint agreed-upon brief statement of the case to be read to the</p> <p>17 jury prior to --</p> <p>18 THE COURT: All right. Did you give me that?</p> <p>19 MR. PEREZ: No.</p> <p>20 THE COURT: Well, then --</p> <p>21 MR. PEREZ: I haven't given you anything, your Honor.</p> <p>22 THE COURT: Well, I'll tell you what you do. You give</p> <p>23 it to me next Tuesday morning, a brief statement of what you</p> <p>24 think the trial is about so I can tell the jury what it's</p> <p>25 about.</p>
<p>Ea11perc Page 10</p> <p>1 discuss that anymore. That's it.</p> <p>2 MR. PEREZ: Yes.</p> <p>3 THE COURT: We're not going to go to White Plains or</p> <p>4 Blue Plains or Pink Plains. It's going to stay right here.</p> <p>5 MR. PEREZ: Yes. But the court asked me, for</p> <p>6 instance, for the summary judgment motion when it came time to</p> <p>7 set the schedule.</p> <p>8 THE COURT: Mr. Perez, we're past that stage. Summary</p> <p>9 judgment motion doesn't mean anything right now. We're going</p> <p>10 to have a trial. We're going to have a trial and that's the</p> <p>11 time for you to put on your case.</p> <p>12 MR. PEREZ: Yes, but the court, for instance -- this</p> <p>13 is just an example. In consideration of my pro se status, the</p> <p>14 court asked me how much time I would need to file my documents</p> <p>15 and it was suggested two months, and I said that's reasonable,</p> <p>16 and I made that deadline.</p> <p>17 THE COURT: Mr. Perez, I don't care what any other</p> <p>18 judge said. I don't bother about that. I'm telling you, we're</p> <p>19 going to try this case on the date that I set it. If you're</p> <p>20 here, fine. If you're not here, that's your problem.</p> <p>21 MR. PEREZ: Well, yes. Well, your Honor, given that</p> <p>22 your Honor's order was postmarked on September 23rd --</p> <p>23 THE COURT: We're through with that. We're through</p> <p>24 with that. I'm telling you what the order is. You're supposed</p> <p>25 to be here in court on the date that I set, and that's it.</p>	<p>Ea11perc Page 12</p> <p>1 MR. PEREZ: Well, it's a list of eight items, and it</p> <p>2 would be --</p> <p>3 THE COURT: Give me another one. Give me another one.</p> <p>4 MR. PEREZ: Well, okay. Well, it's --</p> <p>5 THE COURT: Why didn't you file it with the court?</p> <p>6 Why didn't you file that with the court?</p> <p>7 MR. PEREZ: I'm sorry?</p> <p>8 THE COURT: I mean, I'm trying to be helpful to you</p> <p>9 here. It may not sound that way.</p> <p>10 MR. PEREZ: No, I appreciate that.</p> <p>11 THE COURT: It's very difficult when you're dealing</p> <p>12 with a pro se litigant who should have an attorney. You don't</p> <p>13 have an attorney. You had an attorney and you fired him. I</p> <p>14 don't want to ask why you fired him. I know the reasons people</p> <p>15 fire their attorneys is because they don't like what the</p> <p>16 attorney tells them. That's been my experience, anyway.</p> <p>17 MR. PEREZ: But, your Honor, also, the previous</p> <p>18 opposition counsel filed a letter requesting an adjournment --</p> <p>19 THE COURT: I don't care about the past. All I care</p> <p>20 about is the future.</p> <p>21 MR. PEREZ: But he gave a number of reasons why, even</p> <p>22 for him, it would be --</p> <p>23 THE COURT: Mr. Perez, I'm through with this right</p> <p>24 now. The trial is on the date that I set. Do you know the</p> <p>25 trial date?</p>

<p>Ea11perc Page 13</p> <p>1 MR. PEREZ: Yes, I know the trial date.</p> <p>2 THE COURT: All right. Well, then that's the date.</p> <p>3 I'll see you then.</p> <p>4 Does the defendant have anything to say?</p> <p>5 MR. FENSTERSTOCK: Your Honor, would you like me to</p> <p>6 come up?</p> <p>7 THE COURT: Come up here, yes.</p> <p>8 MR. PEREZ: Should I --</p> <p>9 THE COURT: You can stay there. Stay there,</p> <p>10 Mr. Perez.</p> <p>11 MR. FENSTERSTOCK: So the record is clear, your Honor,</p> <p>12 and I know the Second Circuit has an abuse of discretion</p> <p>13 standard with respect to pro se litigants so I just want to</p> <p>14 make a couple of very brief statements to clarify and correct</p> <p>15 what Mr. Perez said on the record, which was false. He said</p> <p>16 that he only received your order on September 25th. That is</p> <p>17 a fabrication. As soon as we noticed our appearance -- and you</p> <p>18 know we're new lawyers to the case -- which was on</p> <p>19 September 19, on September 20th, at 12:40 p.m., I left a</p> <p>20 substantive message for Mr. Perez. In that message I said, "I</p> <p>21 hope you received the pretrial order. If you have any</p> <p>22 questions, call me."</p> <p>23 At 8:18 in the evening, on September 20th, he called</p> <p>24 me and he e-mailed me and he acknowledged receipt of my e-mail</p> <p>25 by substantive voice message, confirmed that his contact</p>	<p>Ea11perc Page 15</p> <p>1 drafts, all of the documents that we had to prepare, pursuant</p> <p>2 to your order, a day before and sometimes four days before, he</p> <p>3 just represented to your Honor that he received them. That</p> <p>4 should clear up the record with respect to Mr. Perez's</p> <p>5 knowledge of when he had to comply.</p> <p>6 Your Honor, we also have five in limine motions on</p> <p>7 today. I don't know if you've had a chance to review them.</p> <p>8 And they're all filed.</p> <p>9 THE COURT: All right. Yes. You have one motion to</p> <p>10 preclude Mr. Perez from referring to a theory that he was</p> <p>11 terminated in retaliation for reporting any omission. What do</p> <p>12 you mean by that?</p> <p>13 MR. FENSTERSTOCK: Your Honor, one of the issues in</p> <p>14 this case is a press release which was issued by Progenics and</p> <p>15 Wyeth, joint press release with respect to progress on a drug,</p> <p>16 and that is what Mr. Perez has said. That was a May press</p> <p>17 release. In August he wrote a memo which said that that press</p> <p>18 release was totally false. He was terminated as a result of</p> <p>19 taking confidential information subsequently. He has said,</p> <p>20 throughout the case, that one of the reasons he was terminated</p> <p>21 was not only because the press release was false and therefore,</p> <p>22 in his words, fraudulent to stockholders but that he tried to</p> <p>23 argue in the summary judgment that it was because my client</p> <p>24 omitted certain facts relative to the progress of the drug; in</p> <p>25 other words, going from Phase II to Phase III tests. Judge</p>
<p>Ea11perc Page 14</p> <p>1 information in the Southern District ECF system was correct,</p> <p>2 and stated he would call me on Monday morning to have a full</p> <p>3 telephone call. We then confirmed over the weekend and we had</p> <p>4 a full telephone call on Monday morning, the 22nd.</p> <p>5 To make sure that he received the pretrial order</p> <p>6 again, I sent it to him by e-mail on September 21, Sunday, four</p> <p>7 days before he says he got it.</p> <p>8 We had a long substantive call on Monday, the 22nd,</p> <p>9 from 9:00 in the morning till 9:26. We talked about the</p> <p>10 pretrial order, we talked about everything that had to be</p> <p>11 submitted. I told him, to facilitate his response and his</p> <p>12 compliance with the order, we would send him the joint brief</p> <p>13 statement, draft, and the jury instructions, which we did.</p> <p>14 We sent him our draft the next morning and he followed</p> <p>15 that up with an e-mail to me saying thank you, and to quote</p> <p>16 him, he said, "for putting together both drafts that can serve</p> <p>17 as a starting point in our efforts to reach a mutual agreeable</p> <p>18 final version." That was Tuesday, September 23rd. So all</p> <p>19 this happened two days before he says he got the order. I want</p> <p>20 to make the record absolutely clear.</p> <p>21 Then on the 24th, we e-mailed him again with all of</p> <p>22 our pretrial documents that we had to file pursuant to the</p> <p>23 order. We worked day and night to comply with your order. And</p> <p>24 at 9:19 that night, on the 24th, he acknowledged receipts of</p> <p>25 my e-mails and all of the documents. So he had received both</p>	<p>Ea11perc Page 16</p> <p>1 Karas, in his decision on reconsideration, specifically said</p> <p>2 that plaintiff cannot base his Sarbanes-Oxley claim on the</p> <p>3 theory that he was terminated in retaliation for providing any</p> <p>4 information about an omission. Then he says Perez is precluded</p> <p>5 from proceeding on the theory that he reasonably believed the</p> <p>6 May 22nd joint press release was fraudulent because it</p> <p>7 omitted information about Phase III clinical trials. He goes</p> <p>8 through the decision for reconsideration and he says several</p> <p>9 times that Mr. Perez's claims are based on representations,</p> <p>10 statements, affirmative statements, that were made in the press</p> <p>11 release, not omissions, and therefore, he cannot proceed on</p> <p>12 omissions.</p> <p>13 We are concerned that Mr. Perez will bring in all</p> <p>14 sorts of other things like we didn't mention Phase III, we</p> <p>15 didn't mention this, we didn't mention that, and that obviously</p> <p>16 cannot be the basis of his claim, and it would be prejudicial,</p> <p>17 under Federal Rule of Evidence 401, before the jury. So that's</p> <p>18 our first motion in limine, to preclude that evidence. And</p> <p>19 we've spelled it out in our memorandum, supporting memorandum,</p> <p>20 your Honor.</p> <p>21 THE COURT: All right. The next is to preclude</p> <p>22 Mr. Perez from referencing any information that he did not know</p> <p>23 as of August 4, 2008 to prove his alleged reasonable belief</p> <p>24 under the Sarbanes-Oxley Act.</p> <p>25 MR. FENSTERSTOCK: Under Section 806 of</p>

<p>Ea11perc Page 17</p> <p>1 Sarbanes-Oxley, on a retaliation claim, Mr. Perez, in order to 2 win, has to show a reasonable belief that at the time of his 3 August 4, 2008 memo, that Progenics violated a federal law. He 4 claims that as of that time, we committed fraud. Under 5 Sarbanes-Oxley and the cases that follow it, that requires 6 actual belief at the time on the basis of knowledge available 7 to him, or somebody in his position and circumstances at the 8 time. That requires a subjective and objective analysis of the 9 elements. Under the Sharkey case in the Southern District and 10 every other case that has discussed this, as well as Federal 11 Rule of Evidence 401, he cannot use after-the-fact evidence to 12 show that he believed on August 4th certain things were 13 false. That's all it is, your Honor. It's pretty simple. 14 It's pretty straightforward. 15 THE COURT: You understand that, Mr. Perez? Do you 16 understand what he said? 17 MR. PEREZ: Yes. I would like an opportunity to 18 respond. 19 THE COURT: Well, those motions are granted. Those 20 motions are granted. That means his motions are permissible. 21 MR. PEREZ: I'm sorry, your Honor. I just said that I 22 would like an opportunity now to respond. 23 THE COURT: You have to speak into the microphone. I 24 can't hear you. 25 MR. PEREZ: Yes, your Honor. I said I would reply to</p>	<p>Ea11perc Page 19</p> <p>1 facts, and what I communicated with defendant was that it 2 presented a rosy picture of the developments, which was 3 essentially that was information that was misleading to 4 investors and that it was that there was a press release in 5 which everything presented was positive when in reality, behind 6 doors -- 7 THE COURT: Did you present a press release? Were you 8 the one that gave the press release? 9 MR. PEREZ: Well, I brought it to the attention of my 10 employer at the time that the contents -- 11 THE COURT: Do you have a copy of the press release? 12 MR. PEREZ: Not in front of me. 13 THE COURT: I mean do you have it -- 14 MR. PEREZ: Absolutely. 15 THE COURT: -- to give to the jury? 16 MR. PEREZ: Yes. 17 THE COURT: Well, the press release speaks for itself. 18 Whatever this press release says, it says. 19 MR. PEREZ: Yes, I agree. 20 THE COURT: But you can't give any explanation over 21 and above that. The press release says what it says and that's 22 it. And you can't -- 23 MR. PEREZ: Oh, yes. Oh, yes, absolutely. I am in 24 agreement with that. 25 THE COURT: Okay.</p>
<p>Ea11perc Page 18</p> <p>1 his motions in limine. First of all, I haven't read them 2 through, because I have received a long list of documents, so I 3 don't even know which document he's referring to, number one. 4 But just to give your Honor brief information that I have, for 5 instance, he's saying he filed a motion in limine, which I 6 haven't seen, saying that -- 7 THE COURT: Did you give him the motion in limine? 8 MR. FENSTERSTOCK: Absolutely, your Honor. We gave 9 him everything we filed as we filed it, and we did an affidavit 10 of service that's in the docket sheet and on the record, your 11 Honor. We followed every single rule that your Honor 12 prescribes. 13 MR. PEREZ: Yes, your Honor, but for today, first of 14 all, for today's conference, what was on the agenda was a 15 discussion of the pretrial submissions and the pretrial date, 16 not the specifics, how I should reply. As far as I know, there 17 was not going to be a discussion about the merit or lack of 18 merit of -- 19 THE COURT: What we're discussing now is what you can 20 say to the jury. That's what we're discussing now. You can't 21 tell the jury you learned something after that you didn't have 22 at the particular time you made the overture. 23 MR. PEREZ: Well, yes, I am aware of that concept and 24 I agree with it, but the problem is that, number one, he's 25 saying that my claim was that the defendant omitted certain</p>	<p>Ea11perc Page 20</p> <p>1 MR. PEREZ: I wrote a memo to my employer at the time 2 explaining in detail with examples why it was, behind closed 3 door, what the company directors were saying: this drug, the 4 formulation of this drug does not meet -- 5 THE COURT: Your whole case is based on the fact that 6 you made this communication -- 7 MR. PEREZ: Yes. 8 THE COURT: -- to your employer and the employer 9 didn't like what you said and so he fired you. 10 MR. PEREZ: Yes. 11 THE COURT: That's it. 12 MR. PEREZ: Yes. 13 THE COURT: So what you do is you show the jury. 14 That's in evidence. You'll present it in evidence, what the 15 press release says. You understand that? 16 MR. PEREZ: Yes. 17 THE COURT: What the press release says and that's 18 all. And then you can comment on the press release, but you 19 can't give any flowery stuff on the outside of it, you 20 understand? 21 MR. PEREZ: Yes. 22 THE COURT: You can't tell the jury anything flowery. 23 You can't say that. You have to say exactly what the press 24 release says. That's up to the jury to decide, with other 25 evidence they may have, whether you're right or not.</p>

<p>Ea11perc Page 21</p> <p>1 MR. PEREZ: Yes, I understand. 2 THE COURT: All right. 3 MR. PEREZ: If I understand correctly, there were a 4 number of motions in limine, so -- 5 THE COURT: Well, I haven't gone through them yet. 6 We're going to go down them. 7 MR. PEREZ: Well, I didn't think that was the reason 8 for calling this conference at the time, when I came here to 9 request an adjournment, and I -- 10 THE COURT: You're not going to get an adjournment so 11 just forget that. 12 Number two is to preclude Mr. Perez from testifying in 13 a narrative form. Now I'm going to allow you to testify in a 14 narrative form. I'm going to allow him to do that. But I'm 15 going to tell the jury that your opposing counsel has a right 16 to interrupt you at any time during your narrative form and 17 make an objection. I'll explain to the jury that they have a 18 right to do that. See, the problem is, you may be saying 19 something on your narrative form that's objectionable and it's 20 not proper. It may be hearsay or there may be some other 21 objectionable reason for it, and he has a right to object to 22 that, and I'll tell the jury that, that he has a right and an 23 obligation to his client to do that. Not that he's trying to 24 interrupt you telling your story, but your story has to be 25 straightforward. Do you know what hearsay evidence is?</p>	<p>Ea11perc Page 23</p> <p>1 MR. PEREZ: Just to be accurate, I was terminated on 2 August 5, 2008, and a few weeks later, I filed that complaint. 3 THE COURT: You filed an application with the 4 Department of Labor. 5 MR. PEREZ: With the Department of Labor. 6 THE COURT: Yes. 7 MR. PEREZ: Also, just to clarify something opposing 8 counsel said at the beginning of his presentation -- 9 THE COURT: The only thing you can testify to is what 10 you know, not what somebody else knows, because you don't have 11 any witnesses here to testify to that. 12 MR. PEREZ: Yes, but your Honor, what Sarbanes-Oxley 13 says is that in finding reasonable belief is what somebody with 14 similar qualifications, somebody, one of his peers, what 15 conclusion would he draw from -- 16 THE COURT: Excuse me for a moment. Your theory is 17 that you sent the memo and they didn't like it and they fired 18 you. 19 MR. PEREZ: Yes. 20 THE COURT: All right. So that's it. So it's up to 21 the jury to decide whether that's right or not. 22 MR. PEREZ: Yes. Okay. But there's a distinction 23 that I want to make. 24 THE COURT: Don't make it to me. I don't want to hear 25 any distinction right now. Let's go to the next one here.</p>
<p>Ea11perc Page 22</p> <p>1 MR. PEREZ: Yes. 2 THE COURT: All right. Well, then you can't give any 3 hearsay evidence. It's only direct evidence of what you 4 yourself know, okay? 5 MR. PEREZ: Yes. Also, your Honor, he also described 6 another motion, about me having a reasonable belief at the 7 time, and my understanding is that what the law says is that 8 it's a reasonable person -- 9 THE COURT: The jury decides whether it's a reasonable 10 belief. 11 MR. PEREZ: Yes, but then opposing counsel is arguing 12 that the reasonable belief should be only what was known to me 13 at the time. 14 THE COURT: Yes. 15 MR. PEREZ: But that various testimony of witnesses 16 that were presented with the evidence of what was -- 17 THE COURT: There are going to be no witnesses in your 18 behalf because you haven't notified them. 19 Counsel, has he notified you of any witnesses? 20 MR. FENSTERSTOCK: He has not, your Honor. 21 THE COURT: Okay. This case was filed when, in 2010? 22 MR. FENSTERSTOCK: 2010 and was preceded by a 23 Department of Labor -- 24 THE COURT: Department of Labor application, right. 25 MR. FENSTERSTOCK: Since 2008, right.</p>	<p>Ea11perc Page 24</p> <p>1 MR. PEREZ: I'm sorry, your Honor. I couldn't hear. 2 THE COURT: I'm just saying, we'll go on to the next 3 one. I'm tired of listening to these descriptions. 4 Now the next one is for an order permitting Progenics 5 to take the deposition of Bruce Schneider to preserve his trial 6 testimony. What's the situation on that? Who is this fellow? 7 MR. FENSTERSTOCK: Yeah. Dr. Schneider submitted an 8 affidavit in 2013 on the summary judgment motion. He is a key 9 witness. He was an executive vice president/chief of 10 operations in charge of project oversight and a PhD at Wyeth. 11 You remember Wyeth had a joint venture basically -- 12 THE COURT: Why wasn't his deposition taken before? 13 MR. FENSTERSTOCK: Well, your Honor, we were not 14 counsel then, but it is not unusual, as you know, if you have a 15 friendly witness, not to take his deposition and produce him at 16 trial. As soon as we appeared in this case, as soon as, the 17 second we appeared in the case, we contacted Dr. Schneider. We 18 asked him if he would be available on October 28th. He wrote 19 me and he said: No, I'm out of the country. 20 THE COURT: Are you trying to tell me he's unavailable 21 for deposition at that particular time? What are you trying to 22 tell me? Why do you want to take his deposition now and you 23 didn't take it before? 24 MR. FENSTERSTOCK: Should it have been taken before, 25 your Honor? I'm not going to second-guess my previous counsel.</p>

<p>Ea11perc Page 25</p> <p>1 He is a key witness which the jury should be able to hear. He 2 put in a very substantive affidavit from the Wyeth side, which 3 talked about the press release, which talked about the process, 4 which talked about Dr. Perez's memo. 5 THE COURT: He's your witness? 6 MR. FENSTERSTOCK: Yes, your Honor. 7 THE COURT: Why do you have to take his deposition 8 before? 9 MR. FENSTERSTOCK: Because he's going to be 10 unavailable. He's out of the country. 11 THE COURT: Why didn't you tell me that in the first 12 place? 13 MR. FENSTERSTOCK: I thought I did, your Honor. 14 THE COURT: Maybe you did and I didn't hear. When can 15 you take the deposition? 16 MR. FENSTERSTOCK: He gave me dates of October 7th 17 to 10th, October 14th, and October 16th, so I will get to 18 him and get a date. One of those dates he will be deposed. 19 THE COURT: Mr. Perez, do you understand he wants to 20 take this doctor's deposition? 21 MR. PEREZ: Yes. May I comment? 22 THE COURT: What date is agreeable to you? 23 MR. PEREZ: May I comment, your Honor? 24 THE COURT: No, I don't want to hear. I'm going to 25 allow the deposition to be taken. What date do you like? Give</p>	<p>Ea11perc Page 27</p> <p>1 going to be? 2 MR. FENSTERSTOCK: He'll be at our office on 3 October 14th. 4 THE COURT: Do you know where his office is? 5 MR. PEREZ: Yes. 6 THE COURT: Fine. 10:00 in the morning on that date. 7 MR. FENSTERSTOCK: Thank you, your Honor. 8 THE COURT: All right. You'll be there. 9 MR. PEREZ: Yes. 10 THE COURT: Okay. Fine. 11 MR. FENSTERSTOCK: And there's one other in limine 12 motion, your Honor. 13 THE COURT: Yes. To preclude Mr. Perez from referring 14 to his alleged damages for loss of reputation. There's no loss 15 of reputation, emotional distress, depression, or psychological 16 injuries involved. The only thing you're entitled to is back 17 pay. The only thing you're entitled to is back pay in 18 Sarbanes-Oxley. 19 MR. PEREZ: There's a list of damages in the 20 Sarbanes-Oxley law, your Honor. 21 THE COURT: There's no emotional distress. What 22 damages are you claiming? 23 MR. PEREZ: Well, off the top of my head, it's, yes, 24 emotional distress -- 25 THE COURT: No, you can't. The jury is not going to</p>
<p>Ea11perc Page 26</p> <p>1 him the dates again. 2 MR. PEREZ: Yes, but your Honor -- 3 THE COURT: October 7th through 10th, 4 October 14th, and October 16th. Do you want to agree on 5 October 16th? 6 MR. PEREZ: But it's -- 7 THE COURT: You're not going to say anything. Just 8 tell me the date you want. I granted it. 9 MR. FENSTERSTOCK: October 14th or 16th? Which 10 one would you like? 11 MR. PEREZ: What is 14th? What day of the week is 12 that? 13 MR. FENSTERSTOCK: I don't have my calendar. 14 MR. PEREZ: No, 14th would be fine. 15 THE COURT: What time? 16 MR. FENSTERSTOCK: 10:00 in the morning? 17 THE COURT: 10:00 in the morning, Mr. Perez? 18 MR. PEREZ: Yes. And for how long? 19 THE COURT: Where? Tell him where. 20 MR. FENSTERSTOCK: Well, he lives outside of 21 Philadelphia, your Honor. 22 MR. PEREZ: No. 23 THE COURT: No. Here. 24 MR. PEREZ: In White Plains. 25 THE COURT: We want him here in New York. Where is he</p>	<p>Ea11perc Page 28</p> <p>1 decide emotional distress. 2 MR. PEREZ: Pain and suffering. I have to -- 3 THE COURT: No pain and suffering. Just back pay. 4 MR. PEREZ: And reinstatement. 5 THE COURT: Do you understand I don't make these laws? 6 MR. PEREZ: Yes. 7 THE COURT: Under the Sarbanes-Oxley, there's no pain 8 and suffering, no emotional distress, none of that business. 9 It's just back pay. 10 MR. PEREZ: Your Honor, there's back pay and then also 11 it says reinstatement to the position that employee would have 12 had -- 13 THE COURT: No, no, no, no. You're just going to get 14 back pay. Back pay. Are you prepared to tell the jury what 15 your back pay was and how much you're entitled to? 16 MR. PEREZ: Yes. 17 THE COURT: All right. Fine. That's it. Okay. 18 MR. FENSTERSTOCK: Your Honor, just to clarify, 19 because I don't want there to be an error on the record, under 20 Sarbanes-Oxley, Section 806, should he prevail, should 21 Mr. Perez prevail, he is entitled to back pay with interest, 22 litigation costs, expert witness fees, reasonable attorney's 23 fees, and reinstatement. Those are specifically provided in 24 the statute, your Honor. 25 THE COURT: Yes, but the jury doesn't decide that. I</p>

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1 decide that.

2 MR. FENSTERSTOCK: Yes. Thank you, your Honor.

3 THE COURT: The only thing the jury decides is back
4 pay.

5 MR. FENSTERSTOCK: Thank you, your Honor. I just
6 wanted to clarify.

7 THE COURT: Yes, yes. Okay?

8 MR. PEREZ: Yes. Your Honor, yes. May I make a
9 comment?

10 THE COURT: Yes, make a comment.

11 MR. PEREZ: Because it's very important. It goes to
12 my character. Opposing counsel stated that I had received the
13 order prior -- that he forwarded it to me prior to the day the
14 documents were due. He did that and then he also sent -- we
15 had a discussion on Monday morning in which he stated that your
16 Honor had already denied the previous opposing counsel's
17 request for adjournment.

18 THE COURT: Mr. Perez, listen. I heard what you said,
19 I heard what he said. I don't need any more. I'll tell you
20 this. I always ask for the attorneys to get together and
21 jointly agree on a set of jury instructions. I know I'm not
22 going to get that from you and I know you're not going to get
23 together. I've got his copy. I'll make my own copy of the
24 jury instructions that the jury has to see. I'll give you a
25 copy of that before I read it to the jury and you'll have an

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1 opportunity to go over it and make any objections you want to
2 make to the instructions that I'm going to give. So you don't
3 have to give me any instructions. I'll do that myself.

4 MR. PEREZ: Okay. Yes, I appreciate that, your Honor.
5 And just to remind your Honor that this is a case that is more
6 complicated than it appears.

7 THE COURT: It's not complicated. There's no such
8 thing as a complicated case. The only complication is the
9 attorneys make it complicated. There case is not complicated.
10 It's a simple case.

11 MR. PEREZ: Yes. But going to the facts, all this
12 started with retaliation when I opposed the use of another
13 drug.

14 THE COURT: I don't want to hear that. The jury hears
15 that. I've heard enough. I've read all your papers. I know
16 what the case is all about. So I'll see you the date of the
17 trial. Okay?

18 MR. FENSTERSTOCK: Thank you, your Honor.

19 THE COURT: All right. Nice seeing you. Have a good
20 day.

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**JULIO PEREZ, v
PROGENICS PHARMACEUTICALS, INC.,**

October 1, 2014

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